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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1142

JAMES A. SCHLESINGER, Secretary of Defense, and BERNARD B. LYNN, Director of Defense Contract Audit Agency,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Respondent,

and

GILBERT A. CUNEO,

Respondent-Intervenor.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT AND RESPONDENT-INTERVENOR IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT L. ASHENHURST
HERBERT L. FENSTER
1625 K Street, N.W.
Washington, D.C. 20006
Attorneys for Respondent and Respondent-Intervenor

Of Counsel:

SHEA, GOULDEN & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

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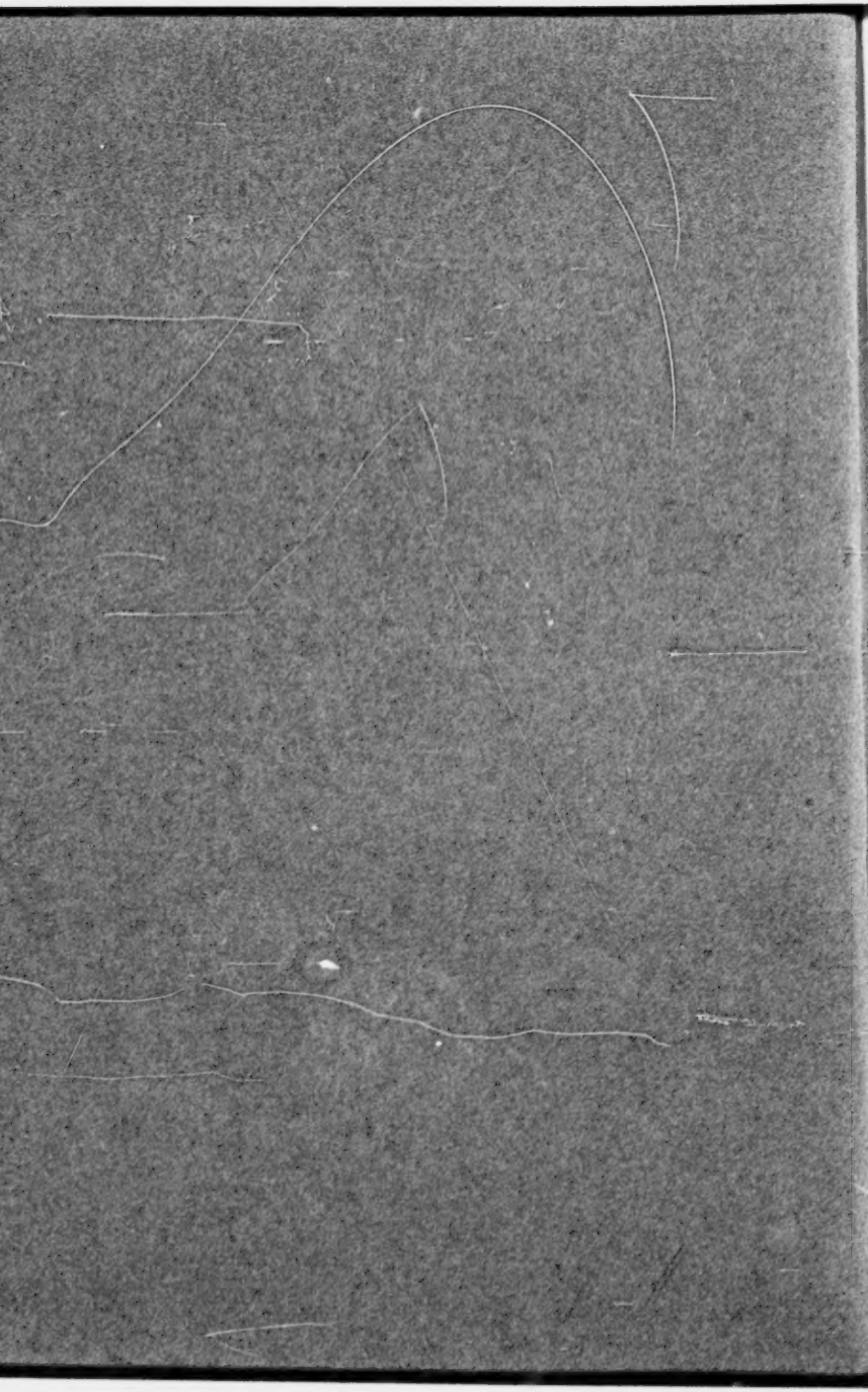

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QUESTION PRESENTED

Whether under Rule 53(b) of the Federal Rules of Civil Procedure the District Court properly ordered the appointment of a special master to make recom-

mended findings on the Defense Contract Audit Agency Manual, the release of which is sought under the Freedom of Information Act.

STATEMENT OF THE CASE

This action was among the first filed under the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. § 552 (1970), *as amended,* Pub. L. No. 93-502, 88 Stat. 1561 (1974). The action was filed one day after the FOIA became effective, July 7, 1967. The complaint requested access to the Defense Contract Audit Manual. Perhaps no case under FOIA has been as vigorously contested as the instant one and this is petitioners' second attempt to have the case reviewed by this Court. *Cuneo* v. *Schlesinger, cert. denied, Rosen* v. *Vaughn,* 415 U.S. 977 (1974).

In its original decision the District Court concluded that the Manual was exempt from disclosure under 5 U.S.C. § 552(b)(2) and (5). *Cuneo* v. *Laird,* 338 F. Supp. 504 (D.D.C. 1972). The Court of Appeals reversed, noting that the District Court's findings of fact were not detailed enough for a determination as to whether or not any part of the Manual (consisting of three volumes and hundreds of pages) contained material not within the exemptions. The Court held further that to the extent the Manual refined and applied the cost principles of the Armed Services Procurement Regulations, the Manual contained "secret law" which must be disclosed to the public. *Cuneo* v. *Schlesinger,* 484 F.2d 1086 (D.C. Cir. 1973). The Court of Appeals did not then reach other issues which are pending in the case, such as waiver and prior publication.

On remand, the burden on the District Court required its determination as to whether the Manual

contained accounting principles and practices and refinements of the cost principles in the Armed Services Procurement Regulations. The Court of Appeals suggested in this regard that the District Court might appoint a special master to examine the Manual, the government's justification for nondisclosure, and the index of the Manual's contents which the government was required to prepare. *Cuneo* v. *Schlesinger, supra,* 484 F.2d at 1092.

The District Court considered the record on remand, which record included the following salient features not discussed in the Petition for a Writ of Certiorari:

1. The petitioners have distributed at least 2,244 copies of the Manual in addition to those distributed within the Defense Contract Audit Agency. (App. A). Distributees entirely outside the Department of Defense totaled at least 901 persons or instrumentalities. (App. A). Included among the many admitted authorized distributees entirely outside the government are the Italian Embassy, the German Military Representative to the United States, the British Embassy and the Canadian Embassy, as well as a number of officials of state and local governments. (App. A).

2. Contrary to the petitioners' statement in the Petition for a Writ of Certiorari, government agencies appearing before the Armed Services Board of Contract Appeals (hereinafter ASBCA), of which the appointed special master is Vice Chairman, have attempted to rely upon the provisions of the Manual to argue for the disallowance of costs incurred during the performance of government contracts. *The Boeing Company,* ASBCA No. 14370, 73-2 BCA ¶ 10,325 (1973); *LTV Aerospace Corp.,* ASBCA

No. 17130 (Unpublished Order dated February 12, 1974) (App. B).

3. The ASBCA has on several occasions ordered the production for *in camera* inspection of portions of the Manual and, after review, required disclosure of at least portions of the Manual.

4. Portions of the Manual have been published and offered for sale for profit by private publishers. (App. C.)

5. A copy of the Manual was provided by petitioners to the ASBCA and was kept by the ASBCA in its library, which is open to segments of the public. This copy was removed from the ASBCA library by petitioners' agents when its presence there was disclosed by the respondent-intervenor in this case. (App. D.)

6. Employees of the Defense Contract Audit Agency are authorized and instructed to disallow costs incurred by contractors based upon the cost principles described in the Manual and such a disallowance is final unless the contractor takes an appeal. (App. E).

After the remand to the District Court, and in accordance with the orders of the Court of Appeals and District Court, petitioners did make a submission to the Court purporting to represent the detailed indexing and analysis required by the Court of Appeals. However, what petitioners in fact submitted to the District Court was merely a copy of the Table of Contents of the Defense Contract Audit Manual which was, by itself, not at all illuminating. Furthermore, petitioners failed absolutely to comply with the other instructions of the Court of Appeals and the District Court which required them to segregate the Manual into manageable segments and provide as to each such segment the

reasons why nondisclosure was authorized by the FOIA All that petitioners did was to resubmit their general defenses to disclosure of the whole Manual, which defenses had been clearly rejected by the Court of Appeals.

Thus, on remand the District Court was faced with the prospect of evaluating hundreds of pages of the Manual containing detailed statements of accounting principles and practices, accounting cost liability criteria, and statements of business and financial practices. This analysis the Court would have had to conduct without any benefit of guidance by plaintiff (respondent-intervenor herein).

Being fully cognizant of this problem, the District Court appropriately directed the appointment of a special master to review the cost principles of the Armed Services Procurement Regulations and the Defense Contract Audit Manual to determine the extent to which the Manual refines and particularizes the general cost principles in the regulations. The Court's reference to a special master appears to be entirely consistent with Rule 53(b) of the Federal Rules of Civil Procedure.

To assure that there are no unauthorized releases of the Manual pending the report of the special master, the Court appointed to serve as master the Vice Chairman of the Armed Services Board of Contract Appeals, Honorable Daniel M. Arons. Judge Arons is an employee of the Department of Defense and is called upon regularly in the course of his official duties to decide contested issues as to allowable costs and the application of cost principles. The cases presented before the Armed Services Board of Contract Appeals

involve disputes arising out of the award, performance, and termination of government contracts. Judge Arons therefore appears not only to be especially qualified in this rather complex field, but has had a copy of the Manual available to him in the Board's library. Moreover, the Board on which he sits has been presented continually with arguments by counsel for government agencies that the Manual controls the disallowance of certain costs incurred by government contractors.

SPECIAL SUBJECT OF THIS PETITION

As the Petition makes clear, it is petitioners' objective to obtain from this Court a decision which would bar Federal District Courts from appointing special masters to conduct *in camera* inspections of documents in complex FOIA cases. *This* object at least is stated directly in petitioners' recitation of the question presented. Though *unstated,* it is equally clear that petitioners' more basic objective is to curtail and limit the operation of the FOIA by imposing on district courts the possibly unmanageable obligation to review without assistance thousands of pages of technically complex documents generated by, or in the possession of, the Federal Government.

Thus, this case is being used by petitioners before this Court as a device to gain a limitation on their disclosure obligations under the FOIA, which result, although not provided by statute, would be far more effective than any of the express exceptions which the Act does contain. Petitioners say virtually nothing about special circumstances in *this* case which would suggest that the appointment of a special master is an abuse of the District Court's discretion under Rule 53,

Federal Rules of Civil Procedure. What is sought then is this Court's imprimatur on a rule of law which would prohibit the utilization of special masters to conduct *in camera* inspection of documents in any FOIA case.

ARGUMENT

1. Though the Freedom of Information Act as originally passed was silent on the subject of *in camera* inspection of documents by the district courts, a substantial body of precedent for such inspections was created. *See, e.g., Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 88 n.15 (1972). In the 1974 amendments to the Freedom of Information Act (Pub. L. No. 93-502; 88 Stat. 1561, effective February 19, 1975), Congress codified the *in camera* inspection procedure by expressly incorporating it into the district court procedures for *de novo* review of agency refusals to produce documents. 5 U.S.C. § 552(a)(4)(B). It is clear that the intent of Congress was to broaden very substantially the instances in which the Federal District Courts could and should examine documents *de novo.* In *Mink,* this Court's discussion of the *in camera* inspection issues which are raised by *Kaiser Aluminum & Chemical Corp.* v. *United States,* 141 Ct. Cl. 38, 157 F. Supp. 939 (1958), is rendered moot by the 1974 amendments to the FOIA. *Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 92, 93. In fact, it seems quite clear that it was the intent of Congress both to broaden disclosure and enlarge the functions of district courts in effecting disclosure in the light of this Court's interpretation of the FOIA in the *Mink* case.

It is not unreasonable to presume, after the 1974 amendments to the Freedom of Information Act, that district courts will be called upon more and more frequently to review documents *in camera*. It is equally clear that many of these cases will involve documents which are so numerous or technically complex that to limit exposure of the documents solely to the facilities of the courts without any assistance from special masters where appropriate would impose upon district courts an impossible burden. It is unlikely that Congress intended such a limitation in expressly providing for *in camera* inspection in the 1974 amendments to the FOIA.

As petitioners note, the appointment of a special master by Chief Judge Hart in the District Court had been suggested expressly by the Court of Appeals in remanding the case. *Cuneo* v. *Schlesinger, supra,* 484 F.2d at 1092. In his concurring opinion in the Court of Appeals, Chief Judge Bazelon pointed out the problems that the courts have encountered in applying the Freedom of Information Act and suggested that the principles for review of records *in camera* are, like much in the law, an experiment to be tried by experience. 484 F.2d at 1093. In a parallel FOIA case, *Vaughn* v. *Rosen,* 484 F.2d 820 (D.C. Cir. 1973), the same Court of Appeals suggested appointing a special master and also set forth detailed criteria for review of records by district courts, presumably to include the special masters they might appoint. This Court has previously denied certiorari in both the *Cuneo* and *Vaughn* cases. *Cuneo* v. *Schlesinger, cert. denied, Rosen* v. *Vaughn, supra.*

This Court should not grant certiorari in the instant case. Certiorari should be denied, permitting the re-

view of documents by the special master to proceed. Here the special master is a person who has already had access to the subject of the FOIA request, the Defense Contract Audit Manual, and is an employee of the Department of Defense. He unquestionably has authority to view and have access to the Manual. In his position as Vice Chairman of the Armed Services Board of Contract Appeals, the special master has supervisory authority over the judges of the Board, and the Board has already passed upon portions of the Defense Contract Audit Manual. Thus, petitioners would, by the appointment of this special master, incur no additional exposure of the document for which protection is sought.

The appointment of a special master in this case seems particularly appropriate in light of Rule 53(b) of the Federal Rules of Civil Procedure, which authorizes reference to a master in matters of account. Rule 53 contemplates explicitly that a "master" may be a referee, auditor, examiner, commissioner, or assessor. True, the function of the master here is not to render a specific accounting on a claim; yet his findings and conclusions will be based upon an application of accounting principles with a view to their specialized application in the Armed Services Procurement Regulations and the Defense Contract Audit Manual.

The petitioners' rather tortured attempt to discount the accounting features of the reference to a master simply ignores the nature of the Manual, its function, its use by government auditors and government attorneys, and the dignity placed by government officials on the principles in the Manual in disallowing costs under a government contract.

2. The petitioners rely almost entirely upon *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). The issue there presented was simply whether a trial judge who preferred to avoid a complicated six-week antitrust trial was justified in referring the trial to a special master. The petitioners' expansive interpretation of that case would preclude the appointment of a special master in any case except perhaps one involving only reconciling books of account. *But see Civil Aeronautics Board* v. *Carefree Travel*, 43 U.S.L.W. 2396 (2d Cir., Mar. 7, 1975).

The convoluted reasoning of the petition is best demonstrated by note 8 at page 10, which reads in its entirety:

> Moreover, if the district court ultimately upholds our position that the Manual does not constitute "secret law," disclosure to Mr. Arons may operate to disqualify him from participating in Board appeals involving audit questions.

The lack of logic here is apparent. If the Manual does not contain secret law, it would have no application to audit questions. If the Manual applies to audit questions, it does indeed constitute secret law and should be disclosed.

The use of a special master as an aid in the preliminary stages of complex litigation has an accepted place in federal practice. In *Collins And Aikman Corporation* v. *J. P. Stevens & Co., Inc.*, 51 F.R.D. 219 (D.S.C. 1971), the district court appointed a special master to hear arguments of counsel on claims of privilege related to documents for which each party sought production. The special master was directed to undertake an *in camera* inspection of documents with respect to

which each party indicated a claim of privilege. The parties were advised by the court that to the extent questions of privilege would need resolution in order to complete discovery, the court would appoint a special master pursuant to Rule 53. The function of the master in *Collins And Aikman* was similar to the function of the master in the instant case. The reference here would in no way deprive petitioners of the decision of a district court. Rather, it would permit the court to act on a fully developed record, including the recommended findings of an Administrative Law Judge with special expertise in the application of complex accounting principles.

3. The Court of Appeals not only refused to issue the requested Writ of Mandamus and/or Prohibition, but denied petitioners' appeal from the Order of the District Court specifically appointing the master. *Cuneo* v. *Schlesinger,* No. 75-1005 (D.C. Cir.) (App. A to Petition for Certiorari, p. 2a). The original opinion of the Court of Appeals reflects its careful consideration of this case before reversing the initial District Court order. *Cuneo* v. *Schlesinger, supra.* The phrase "secret law" used by the Court of Appeals was not intended to suggest that only legal issues were involved in an evaluation of the contents of the Manual. The question is whether the Manual applies to, extends, or refines the cost principles of the Armed Services Procurement Regulations. If indeed the Manual plays any role in the application of these cost principles, it then contains "secret law" which is subject to disclosure under the FOIA. The issue here is quite similar to that presented in *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787 (8th Cir. 1972), where the court held that public disclosure of the Internal Revenue Audit Man-

ual would be an aid in securing compliance with law rather than a hindrance. That reasoning is fully applicable here.

The issue here, then, is not whether appointment of a special master deprives the petitioners of their day in court. Rather, the issue is initially a factual one: Does the Manual have application to cost principles which control performance under a government contract and the allowability of costs associated therewith? To make this determination, the District Court sought the aid of a special master skilled in this field and holding the appointment of an Administrative Law Judge. It seems clear that the appointment of this special master can expedite development of a full record upon which the court can act.

It is difficult to understand the petitioners' reasoning in this case and the reasoning is certainly not disclosed in the Petition for a Writ of Certiorari. The petitioners will not by denial of certiorari be deprived of their right to a trial before the District Court. In fact, since the complex issues which occasionally arise in Freedom of Information Act cases entail the evaluation of specialized documents, district court judges should be given reasonable discretion to seek the assistance of properly qualified persons in recommending findings based upon expert analysis of documents involved.

In the instant case, we are not concerned with matters of national security, and review by Judge Arons will not result in further dissemination of the Manual. It is perplexing that while petitioners object to Judge Arons' review of the Manual, they at the same time have distributed it to the Italian Embassy, the Ger-

man Military Representative to the United States, the British Embassy, the Canadian Embassy, and to officials of state and local governments. Reference to a special master in this proceeding will not render Rule 53 moot. It will instead lead to a more complete record in the instant case and a more enlightened result.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT L. ACKERLY
HERBERT L. FENSTER
1625 K Street, N.W.
Washington, D.C. 20006
Attorneys for Respondent and Respondent-Intervenor

Of Counsel:

SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

Certificate of Service

I hereby certify that on this 10th day of April, 1975, three (3) printed copies of the Brief for Respondent and Respondent-Intervenor in Opposition to the Petition for Writ of Certiorari were served by hand on the following party as required by the Rules of the Supreme Court of the United States:

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

/s/ ROBERT L. ACKERLY
Robert L. Ackerly